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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 DANIEL SMALL,

4 Plaintiff,

5 v.

18 CV 5000 (PKC)

6 CHRISTOPHER KENNEDY, IN HIS
7 CAPACITY AS THE OPERATING
8 MANAGER OF DMRJ GROUP LLC; AND
9 MARTIN TROTT, IN HIS CAPACITY
AS THE OPERATING MANAGER OF
DMRJ GROUP LLC,

10 Defendants.

-----x

11 New York, N.Y.

12 July 16, 2018

2:22 p.m.

13 Before:

14 HON. P. KEVIN CASTEL

15 District Judge

16 APPEARANCES

17 TAYLOR & COHEN

Attorneys for Plaintiff

18 BY: ROBERT COHEN

19 HOLLAND & KNIGHT

Attorneys for Defendants

20 BY: WARREN E. GLUCK

ROBERT J. BURNS

21 MARIE E. LARSEN

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(Case called)

MR. COHEN: Robert Cohen, Taylor & Cohen LLP, for the plaintiff.

THE COURT: All right. And for the defendants.

MR. GLUCK: Warren Gluck, your Honor, Holland & Knight. Also with me is Bob Burns and Marie Larsen and Martin Trott, defendant, is also in the courtroom.

THE COURT: All right. Thank you.

Good afternoon to you all. Thank you for your submissions.

First question is apart from the submissions made heretofore on the motion, does the plaintiff have any other evidence that it wishes to rely on?

MR. COHEN: No, your Honor.

THE COURT: All right.

So the plaintiff rests.

Does the defendant have any other evidence other than its submission including the Trott declaration and exhibits that it wishes to rely on?

MR. GLUCK: Only in the event, your Honor, the Court wishes to address the circumstances of Eileen Bransten's stay orders. There's certain letters that may be relevant. But other than that, no, your Honor.

THE COURT: So the defendant rests.

MR. GLUCK: The defendant rests.

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1 THE COURT: All right.

2 So the evidentiary record in this preliminary
3 injunction hearing is now closed. I will give the movant an
4 opportunity to speak on behalf of the injunction and I guess
5 the first order of business would be to address -- well, I
6 think the Supreme Court's pronouncement in *Grupo Mexicano* and
7 what that means in this case. As well as I'd like to hear from
8 plaintiff on the necessary party, indispensable party issue,
9 and anything else you'd like to address.

10 MR. COHEN: Your Honor, and I am -- you could --

11 THE COURT: You want some help on *Grupo Mexicano*?

12 MR. COHEN: Yes. If you could refresh my recollection
13 as to *Grupo Mexicano*, yes.

14 THE COURT: This was a decision by the U.S. Supreme
15 Court in 1999 and the question before the Court was whether or
16 not a district court judge had authority -- if you want to call
17 it jurisdiction, but authority -- and whether a movant had
18 entitlement to a preliminary injunction which in essence froze
19 assets. And the Court looked at the traditional equitable
20 powers of a court. It looked at the adoption of Rule 64 and
21 Rule 65. And it ultimately concluded that the right to a
22 prejudgment remedy such as an asset freeze was subsumed within
23 Rule 64. And Rule 64 incorporated state court remedies such as
24 arrest, attachment, garnishment, replevin, sequestration, and
25 other corresponding or equivalent remedies. But that a party

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1 generally speaking cannot employ Rule 65 in an action such as
2 this to basically freeze a defendant's assets pending the
3 outcome of litigation.

4 It would be a wonderful way to go and I can't think of
5 a particularly good reason why all litigants or nearly all
6 litigants wouldn't want to avail themselves of that, all
7 plaintiffs. And it's not a question of solvency or the
8 viability of any later judgment. It's a question of the
9 propriety of it as equitable relief.

10 So, obviously, there are cases decided after *Grupo*
11 *Mexicano*. There are arguments that could be made to
12 distinguish it. But that's the general gist of the decision.

13 MR. COHEN: Your Honor, I believe the law is clear
14 that when there is a danger of the nonmoving party making a
15 judgment uncollectible, that preliminary relief is absolutely
16 warranted and appropriate.

17 THE COURT: A preliminary injunction or an attachment?

18 MR. COHEN: Preliminary injunctive relief.

19 THE COURT: So you say this is very clear. Well, I'm
20 asking you to distinguish *Grupo Mexicano* which makes it very
21 unclear to this judge.

22 MR. COHEN: So, your Honor, I am not prepared to do
23 that at this time. What I would request, your Honor, is some
24 expedited, very limited briefing on this very issue. We could
25 get you something tomorrow, for instance. But for me to stand

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1 here today and answer your question I would need to do some
2 additional research.

3 THE COURT: Well tell me why you think you're entitled
4 to preliminary injunction.

5 MR. COHEN: As a matter of law, your Honor, or on the
6 facts, or both?

7 THE COURT: This is your motion so I'm giving you an
8 opportunity how you would like to present it.

9 MR. COHEN: Your Honor, there are a number of
10 uncontested facts here: One, that the operating agreement
11 entitles Mr. Small to 6.5 percent of DMRJ's yearly net profits.
12 It's also uncontested that Implant Sciences was DMRJ's only
13 investment. It's uncontested that in 2012 through 2014 Implant
14 Sciences generated \$38 million in realized profits. This comes
15 from defendants' own submissions.

16 THE COURT: They haven't paid money your client is
17 owed.

18 MR. COHEN: They haven't paid. But not only the \$38
19 million, your Honor.

20 THE COURT: Didn't your client bring an arbitration?

21 MR. COHEN: My client did bring an arbitration decided
22 by Judge Katz formerly of this Court.

23 THE COURT: Did the arbitration address the
24 compensation or only the basis for the termination?

25 MR. COHEN: The arbitration addressed both issues,

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1 found Mr. Small was not fired for cause.

2 THE COURT: OK.

3 MR. COHEN: And it also -- it addressed bonus
4 compensation under a different contract. It's called the
5 investment management agreement. But in concluding that
6 Mr. Small was entitled to bonus compensation under the
7 investment management agreement, Judge Katz, in a 95-page
8 opinion, after eight days of hearings, found that Implant
9 Sciences, which was part of the bonus calculation, generated
10 \$38 million in realized profits from 2012 to 2014. Defendants
11 themselves --

12 THE COURT: Let me pause. Why was that claim
13 arbitrable and not your claim for compensation under the
14 agreement arbitrable?

15 MR. COHEN: There are two different agreements, your
16 Honor. So the IMA had an arbitration clause. This DMRJ's
17 agreement, the operating agreement, does not have an
18 arbitration clause.

19 THE COURT: That's the agreement that gives your
20 client the right to the compensation.

21 MR. COHEN: To the 6.5 percent.

22 THE COURT: To the 6.5. All right. So that explains
23 why it's not part -- wasn't part of the arbitration before
24 Judge Katz.

25 MR. COHEN: Exactly, your Honor.

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1 THE COURT: And you're suing for that 6.5 percent
2 here, right?

3 MR. COHEN: Yes. We're suing for that 6.5 percent
4 here.

5 THE COURT: Putting aside the necessary party issue,
6 let me see whether I understand your injunction is what?

7 MR. COHEN: Because, your Honor, defendants have made
8 it abundantly clear, page fifteen of their opposition brief, I
9 believe, paragraphs 10 and 49 of Mr. Trott's declaration, that
10 they believe that Mr. Small was not entitled to any
11 distributions under the operating agreement. They have zero
12 incentive to hold back any funds to pay Mr. Small should he
13 prevail.

14 THE COURT: That's why you have an action for breach
15 of contract, right?

16 MR. COHEN: That's why we have an action for breach of
17 contract.

18 But, your Honor, if I may, on top of that the
19 defendants have refused, despite the clear language in Section
20 11 of the operating agreement, and clear Delaware law, refused
21 Mr. Small books and records. So their actions are very
22 suspect, your Honor.

23 We have no -- well, we had no reason to believe that
24 they would act in good faith and withhold the necessary sums
25 and they've made that abundantly clear now in their filings

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1 here.

2 THE COURT: So, you have a right under Delaware law to
3 access to certain books and records to the extent it's
4 reasonably related to a member's interest as a member of the
5 LLC.

6 What is the interest as a member of the LLC that
7 you're looking to inspect the books and records?

8 MR. COHEN: Your Honor, before I answer that question
9 there's a right under Delaware law, but there's also an
10 explicit contractual right.

11 THE COURT: Well that's a right for you to conduct an
12 audit, right? That's 11C -- 11.1C, excuse me.

13 MR. COHEN: Yes.

14 THE COURT: Now answer my question about Delaware
15 books and records.

16 MR. COHEN: Mr. Small is entitled to profits, net
17 profits of the LLC; yearly net profits. In order to assess
18 whether he -- whether those profits are being distributed in
19 accordance with the provisions of the LLC agreement, of the
20 operating agreement, he is entitled under Delaware law to
21 examine the books and records that the operating manager --

22 THE COURT: Let me ask you. Have they made any
23 distribution to your client under the operating agreement?

24 MR. COHEN: Mr. Small received a distribution of
25 approximately \$200,000 several years ago.

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1 THE COURT: And you would like to know from your
2 inspection of the books and records whether there are other
3 sums that he's entitled to. Is that --

4 MR. COHEN: Yes.

5 THE COURT: And tell me about the audit. What kind of
6 an audit do you propose?

7 MR. COHEN: We propose that Mr. Small have access to
8 the books -- well, it's really in some sense an alternative
9 relief, your Honor. The books and records are needed to
10 perform an analysis, an audit, to determine what sums Mr. Small
11 is owed. It's simply an alternative form of relief.

12 THE COURT: It's not an accounting though?

13 MR. COHEN: It's not an accounting, no. We're not
14 seeking an accounting.

15 THE COURT: OK.

16 MR. COHEN: Well, your Honor -- no. Let he me
17 rephrase. The complaint does seek an accounting.

18 The complaint seeks the books and records, whether
19 under a contractual -- whether by virtue of the contract or the
20 defendants' fiduciary obligations, so that Mr. Small may assess
21 what he is owed under the agreement.

22 THE COURT: That's access to the books and records
23 under the Delaware statute and under the contractual provision.

24 MR. COHEN: And under the contractual provision.

25 THE COURT: OK. That's what I thought it was.

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1 Go ahead.

2 MR. COHEN: So there is no dispute that -- also, there
3 is no dispute that DMRJ has received in 2017, this is in
4 paragraph 64 of Mr. Trott's affidavit, at least \$46 million in
5 cash from its investments in Implant Sciences. Now we contend
6 it's far more than that but for the purposes this hearing today
7 we can go with 46 million.

8 THE COURT: This is Mr. Trott in his individual
9 capacity?

10 MR. COHEN: Mr. Trott's affidavit states in paragraph
11 64 that DMRJ received approximately \$46 million --

12 THE COURT: No. No. That's what I'm trying to find
13 out from you. When you said Mr. Trott received \$46 million.

14 MR. COHEN: I misspoke, your Honor. DMRJ received \$46
15 million, thank you -- according to Mr. Trott, DMRJ received \$46
16 million from investments in Implant Sciences in 2017. So
17 despite the fact that there were \$38 million in realized
18 profits and \$46 million in cash, it's well over \$80 million.

19 Again, we contend it's more than that but for the
20 purposes of today we'll settle with the defendants' numbers.

21 There's been no distribution.

22 It's also uncontested that Mr. Small has a contractual
23 right, as we just spoke about, to receive the books and
24 records. It's uncontested that he's made a demand. It's
25 uncontested that the demand has been refused.

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1 THE COURT: Have you sought to make a summary judgment
2 motion on your books and records demand?

3 MR. COHEN: We have not, your Honor.

4 THE COURT: But you have decided to make a preliminary
5 injunction argument on the basis that if your books and records
6 action succeeded and if you were able to establish through an
7 examination of the books and records that you are owed money,
8 you fear that that money would be dissipated, and that's your
9 argument for the asset freeze?

10 MR. COHEN: Our argument for the asset freeze is that
11 we believe we have demonstrated that Mr. Small is entitled --
12 is entitled to distributions under the operating agreement.
13 The defendants have said that they have for intention to do
14 that.

15 They have no intention to do that. They have -- there
16 is a complete absence of evidence for that contention that I
17 can get into in a moment.

18 But the basis for the preliminary injunction motion is
19 that these assets will be dissipated. They've stated in papers
20 that they are spending the money and that they do not believe
21 Mr. Small is entitled to any distribution.

22 THE COURT: Go ahead.

23 MR. COHEN: So it's also undisputed, your Honor, that
24 there has been a liquidating event, namely PPVA's filing for a
25 voluntary liquidation in the Grand Court of the Cayman Islands

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1 that triggers Section 10 of the operating agreement's
2 dissolution procedures.

3 The defendants, in their capacity as the operating
4 managers, have not proceeded to initiate any of those
5 liquidation procedures.

6 Defendants have, in court filings -- or I should say
7 Mr. Small's interest in DMRJ is completely absent from any
8 court filings in the Grand Cayman in the Court of the Grand
9 Cayman or here in federal bankruptcy court. They have given no
10 indication that they will do anything to protect his interests.
11 And the evidence that supports -- and I use that term advisedly
12 here, your Honor -- the evidence that supports their
13 contention, there's really four pieces. There's Mr. Trott's
14 affidavit. There's the indictment in the Eastern District of
15 New York together with the SEC complaint. There's the
16 investment management agreement which we just spoke about. And
17 there's Judge Katz's 95-page arbitration decision. I just want
18 to briefly talk about those four pieces of evidence, for lack
19 of a better term.

20 Mr. Trott's -- I'm not going to speak about the
21 falsehoods that Mr. Trott peddles in his affidavit. What's
22 probably more striking is that these are just self-serving
23 conclusionary allegations, your Honor. The allegations
24 themselves are devoid of content. It's not as if Mr. Trott is
25 saying that this investment here lost this much money and

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1 provides no support. That's not what we have here. We have
2 just vague conclusions, also, without any evidentiary support.

3 Paragraphs 6, 20, 34, 62 -- paragraph 62, for
4 instance, speaks to massive losses caused by Mr. Small's
5 actions. No indication of what assets are there. There is no
6 indication of what actions Mr. Small took. To say that there
7 is no evidence to backup any of this whatsoever. So just
8 conclusionary self-serving, quite frankly, spurious
9 allegations.

10 Mr. Trott also then speaks about his investigation.
11 We know nothing about this investigation, your Honor. There's
12 not one iota of detail there. All he offers up are conclusions
13 masquerading as facts. We don't know when the investigation
14 began, what was investigated, who was spoken to, what documents
15 were reviewed. Again no mention of any asset, any loss, any
16 dates, nothing.

17 The SEC -- the EDNY indictment is of no help, your
18 Honor. As we've pointed out in our papers, the U.S. Attorney
19 for the Eastern District of New York has stated in court, in a
20 court filing, that Mr. Small is not part of the valuation
21 scheme that is alleged in the indictment. What the indictment
22 does allege with respect to Mr. Small is that he was involved
23 in a single bond redemption transaction. And the indictment
24 alleges that he played a role in allegedly providing false
25 information in a solicitation that was allegedly designed to

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1 divert proceeds to equity holders. In short, the indictment
2 alleges that Mr. Small was part of an alleged scheme that
3 induced some bondholders not to tender their bonds, not to
4 tender their bonds. Those who did tender their bonds -- this
5 is in the indictment -- received one hundred percent of par
6 value.

7 THE COURT: Bonds of what issuance?

8 MR. COHEN: An entity called Black Elk, your Honor.

9 The SEC complaint does not allege that Mr. Small was
10 involved in any scheme to inappropriately or misvalue any
11 assets. It doesn't allege that he was involved in the
12 valuation of assets. In fact, it only alleges that one entity,
13 Golden Gate Oil, was misvalued. And defendants have provided
14 no evidence whatsoever, and there's none in the SEC complaint,
15 that Mr. Small had any role in that valuation.

16 What I'd like to now turn to, very briefly, is Judge
17 Katz's decision, because Judge Katz was interpreting the IMA.
18 The defendants' position is that under the IMA there were
19 massive losses, again completely unspecified -- not one single
20 asset even mentioned -- massive losses that somehow offset any
21 money Mr. Small would be entitled to under the DMRJ's operating
22 agreement.

23 First, Judge Katz held that from 2012 to 2014
24 Mr. Small was entitled to receive \$7 million in bonus
25 compensation based on his net profits under the IMA. So this

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1 finding by Judge Katz, your Honor, directly contradicts
2 statements that Small's accounts -- by defendants that Small's
3 accounts generated only losses. In direct contradiction.

4 Now what defendants will say is: Oh, Judge Katz did
5 not have this information that assets were allegedly misvalued
6 when he issued that decision. That information didn't come
7 until later.

8 But, again, defendants run up against the very
9 fundamental problem that pervades their entire submission and
10 that is evidence. Not one single asset is mentioned. Not --
11 there's nothing mentioned about any -- about the value of any
12 of these assets that were supposedly misvalued, what losses
13 PPVA supposedly incurred. Nothing, your Honor. There is no
14 evidence there.

15 Second, Judge Katz makes a point that defendants gloss
16 over that the majority of the assets in the -- that were in
17 Mr. Small's account in the IMA, that his bonus was based on a
18 realized only basis, a realized only basis.

19 Thus, even if those assets were improperly valued --
20 and, again, I don't even know what assets they're talking
21 about -- but even if they were, Mr. Small's bonus would not be
22 impacted by that improper valuation.

23 THE COURT: Look, the bonus and any compensation that
24 Mr. Small is entitled to under the award of the arbitrator is
25 not a matter that's before this Court, is it?

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1 MR. COHEN: I agree with you, your Honor. I agree
2 with you. We -- yes. Yes. He -- Judge Katz has decided --

3 THE COURT: It's not before me, period.

4 MR. COHEN: It's not before you. I agree with you.

5 THE COURT: Well in that case maybe I should suggest
6 that you get to the part that is before me rather than the part
7 that's not before me.

8 MR. COHEN: Well, your Honor, if I may, defendants are
9 contending that Mr. Small is not entitled to distributions
10 under the DMRJ's operating agreement because he suffered
11 losses, because he suffered losses under the IMA. And I made
12 my point to inform the Court that Judge Katz firmly disagreed
13 with that. He found that no, there were actually profits
14 generated under the IMA that entitled Mr. Small to a bonus.

15 THE COURT: Listen, maybe I misheard you, maybe I
16 misread, maybe I misunderstood, but I thought the premise of
17 your 6.5 percent claim was based on DMRJ's investment in
18 Implant, secured by a convertible note plus warrants. And he
19 claims that he's entitled to annual distributions under the
20 operating agreement.

21 Am I missing something?

22 MR. COHEN: You are not, your Honor. I'm simply
23 responding to an argument that defendants have made in their
24 opposition papers. But I can move on.

25 I also want to point out that while Judge Katz ruled

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1 conclusively for Mr. Small on his contract claims, he denied
2 Mr. Small's claim under New York labor law. And I point this
3 out because in Judge Katz's ruling he found, among other
4 things, that Mr. Small did not have the "authority to make key
5 decisions that generated the net profits on which his bonus was
6 based." So then Judge Katz went onto identify specific aspects
7 of the investments over which Small had no authority.

8 THE COURT: Let me ask you, was Mr. Small ever
9 employed by DMRJ?

10 MR. COHEN: Yes, he was.

11 THE COURT: In what capacity?

12 MR. COHEN: He was the portfolio manager.

13 THE COURT: And the portfolio consisted solely of the
14 investment in Implant.

15 MR. COHEN: Solely of the investment in Implant.

16 THE COURT: All right. And when did he cease to be
17 the portfolio manager?

18 MR. COHEN: July 31, 2015.

19 THE COURT: Same day as his employment by Platinum
20 Management ended?

21 MR. COHEN: Yes.

22 THE COURT: OK.

23 MR. COHEN: So I just want to note, your Honor, that
24 Judge Katz, when he was describing specific aspects of the
25 investments over which Small had no authority.

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1 THE COURT: Was DMRJ a party to the arbitration before
2 Judge Katz?

3 MR. COHEN: No, your Honor.

4 Again, Mr. Small was not seeking the 6.5 percent from
5 DMRJ. He was seeking his bonus compensation under the IMA.

6 THE COURT: Yes.

7 But describing his responsibilities for Platinum is
8 not describing his responsibilities for DMRJ, correct?

9 MR. COHEN: That is correct, your Honor.

10 THE COURT: Go ahead.

11 MR. COHEN: I only note that Judge Katz on page 55 and
12 56 of his ruling held that unrealized profits were determined
13 by Platinum's valuation committee. And he made no finding that
14 Mr. Small was a part of that valuation committee or had any
15 role in the valuation of assets.

16 Again, this directly contradicts the vast majority of
17 defendants' argument that Mr. Small somehow had some
18 unspecified role in bankrupting and financially ruining PPVA.
19 Judge Katz --

20 THE COURT: What do you think you have to show in
21 order to get a preliminary injunction?

22 MR. COHEN: I think I have though show a strong prima
23 facie case, your Honor, which I believe we have shown.

24 THE COURT: Prima facie case of what?

25 MR. COHEN: A prima facie case that Mr. Small is

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1 likely to succeed on his contract claim.

2 THE COURT: Thank you.

3 MR. COHEN: And I believe we have. We have shown that
4 DMRJ has realized profits. We have shown they have at least
5 \$46 million in cash coming in. This is not an ambiguous
6 contract provision that defendants are arguing over. He hasn't
7 been paid out any of the money.

8 And defendants, their defenses, which seem to say that
9 Mr. Small somehow bankrupted PPVA, was somehow responsible for
10 its financial ruin are based -- there is no evidence there.
11 Not only is there no evidence, there are no specific
12 allegations. So I think we more than made our strong showing.
13 There is, as I said before, there is a danger, given
14 defendants' statements, that there will be no money left to
15 collect because they don't believe Mr. Small is entitled to any
16 money.

17 So that's all I have. I'd be happy to answer any more
18 questions, your Honor.

19 THE COURT: Maybe you can address the necessary party
20 issue.

21 MR. COHEN: Well, your Honor, there are -- in order to
22 get complete relief, I do not believe DMRJ needs to be here.
23 DMRJ acts through its operating managers. As defendants have
24 stated, they control the company. They are the operating
25 managers. They control the company. Complete relief can be

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1 afforded if the operating managers do what they are supposed to
2 do under the operating agreement and make the distribution to
3 Mr. Small.

4 THE COURT: And if you lose in this action?

5 MR. COHEN: If we lose in this action?

6 THE COURT: You can proceed against DMRJ, correct?

7 MR. COHEN: I suppose that's a theoretical
8 possibility.

9 THE COURT: Because it's theoretical because you can
10 win.

11 MR. COHEN: Well, your Honor, it would be the same
12 relief on the same sets of facts, what we're asking for. DMRJ
13 acts through its operating managers. We're telling the
14 operation managers to disburse funds. If we told DMRJ to
15 disburse funds, the operating managers would be the ones to do
16 it.

17 THE COURT: But the point is DMRJ would not be
18 protected by a judgment in this case?

19 MR. COHEN: DMRJ would not be -- DMRJ might have some
20 estoppel arguments, your Honor. I mean defendants have not --
21 defendants who control DMRJ have not made the case that DMRJ
22 needs to be in the case to afford complete relief or to protect
23 its interests. When a third party under the joinder rules --

24 THE COURT: This is not an unusual situation; not the
25 first, and not the last where the plaintiff, for plaintiff's

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1 good and sufficient reason, wants to be in federal court; and
2 the defendant, for its good and sufficient reasons, is
3 delighted to be in federal court rather than state court. That
4 does not necessarily mean that either of you belong here. And
5 the fact that the defendants say: Well, if we assert the
6 failure to join an indispensable party and we win, Mr. Small
7 will be back at this tomorrow in state court with DMRJ as a
8 party.

9 MR. COHEN: Your Honor, if I may, your Honor --

10 THE COURT: And so they sit on their hands.

11 MR. COHEN: If DMRJ were added to a party here, I
12 don't think we'd be in state court.

13 THE COURT: Well you wouldn't be in this court.

14 MR. COHEN: There would still be diversity
15 jurisdiction.

16 THE COURT: Is Mr. Small a member of the LLC?

17 MR. COHEN: Is Mr. -- DMRJ has no operations here.

18 THE COURT: Stop. Is Mr. Small a member of the LLC?

19 MR. COHEN: He's a profit interest member.

20 THE COURT: He's a member.

21 MR. COHEN: He's a member.

22 THE COURT: He's a member.

23 And he is a citizen of the State of New York?

24 MR. COHEN: He's a citizen of the State of New York.

25 THE COURT: And he would be suing the LLC of which we

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1 know for a fact at least one person, an individual by the name
2 of Small, is a member and, therefore, there would be no
3 diversity jurisdiction, correct?

4 MR. COHEN: We could bring this -- correct.

5 THE COURT: So it would affect this Court's
6 subject-matter jurisdiction.

7 MR. COHEN: I am mistaken, your Honor. Thank you for
8 correcting me.

9 THE COURT: So tell me why DMRJ is not a necessary
10 party.

11 MR. COHEN: Again, your Honor, complete relief can be
12 afforded -- if the plaintiff wins, if Mr. Small wins in this
13 case, complete relief is afforded. Complete relief can be had
14 by Mr. Small. If the other two factors, 19(a)(1)(B)(i) and
15 (iii) -- (i) and (ii), excuse me, are contingent upon an
16 initial requirement that the absent party claim a legally
17 protected interest related to the subject matter of the action.
18 So, we do not control DMRJ. We cannot cause DMRJ to say that
19 it needs to be a party here.

20 THE COURT: Well, let me ask you. The assets that you
21 claim should be frozen are the assets of DMRJ, correct?

22 MR. COHEN: Yes.

23 THE COURT: Doesn't that answer the question?

24 MR. COHEN: It still, under the joinder rules, your
25 Honor, if complete relief can be afforded without -- DMRJ is

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1 not a necessary party if complete relief can be afforded here.

2 THE COURT: How is this any different than having a
3 claim against General Electric and wanting to bring it in
4 federal court. So instead of suing General Electric which in
5 my hypothetical or XYZ Corporation is a New York corporation
6 with its principal place of business in New York, one sues the
7 CEO who happens to be a citizen of Connecticut. How is this
8 any different?

9 You say, listen, the CEO or we can name the CEO and
10 all the directors. They have the power to freeze the assets.
11 They have the power to direct the payment of compensation to my
12 client and, therefore, General Electric is not a necessary
13 party or the corporation is not a necessary party because full
14 relief can be afforded to my client by suing only the CEO and
15 the board. Explain the distinction.

16 MR. COHEN: Your Honor, here we have the operating
17 managers are specifically vested with the responsibilities here
18 of making distributions and implementing the contractual
19 obligations in the operating agreement.

20 THE COURT: That's often true for a CEO, right?

21 MR. COHEN: I guess -- it might depend on what the
22 CEO's contract is and what the CEO's responsibilities might be.

23 THE COURT: But it's certainly conceivable.

24 MR. COHEN: I will grant you that, your Honor, yes.

25 THE COURT: The same way with the board of directors.

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1 If you name the whole board of directors, they are the managers
2 of the corporation, so it's their ultimate responsibility.

3 MR. COHEN: That is a possibility, your Honor.

4 THE COURT: Well they are the managers of the
5 corporation.

6 MR. COHEN: Yes.

7 THE COURT: So the distinction here is what?

8 MR. COHEN: The distinction here, your Honor, I'm not
9 sure if -- I'm not sure on the way you present the facts if
10 there is much of a distinction, quite honestly. I'll be candid
11 with the Court.

12 I would refer back, though, to the Federal Rules of
13 Civil Procedure which speak about complete relief, complete
14 relief afforded to the plaintiff by the parties in the case.
15 That's what the federal rules speak to. It's fairly narrow.

16 THE COURT: If complete relief cannot be afforded
17 without the parties' joinder, that is one of the circumstances
18 that would make the person a person required to be joined if
19 feasible. Right?

20 MR. COHEN: Yes.

21 But here, your Honor, under the rule, under Rule 19 --

22 THE COURT: You say (b) doesn't apply because the
23 person hasn't claimed an interest relating to the subject of
24 the action because they're not here.

25 MR. COHEN: The law --

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1 THE COURT: But you also told me the assets that are
2 being frozen are the assets of this person not before the
3 Court.

4 MR. COHEN: Well of a corporate entity, yes, your
5 Honor, a corporate entity.

6 THE COURT: Or an LLC.

7 MR. COHEN: An LLC. Yes, your Honor.

8 But the operating managers, the defendants, who are
9 the operating managers, have and are making decisions everyday
10 on how to distribute the funds, how to distribute DMRJ's funds.
11 We think they are doing it wrongfully. But they're doing that.
12 And they are imbued contractually with the authority to make
13 these decisions and the rights to make these decisions. So if
14 Mr. Small sues them, as he has, in their capacity as managers,
15 he, Mr. Small, can get complete relief. And that's what the
16 rule focuses on.

17 THE COURT: Thank you.

18 Let me hear from the defendants. Who is going to
19 speak for the defendants?

20 MR. GLUCK: I will, your Honor.

21 THE COURT: First question. Is DMRJ a necessary
22 party, yes or no?

23 MR. GLUCK: Yes.

24 It will be a necessary party. We've not submitted our
25 answer yet. That will be included in our answer. The final

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1 relief sought, which is a payment of money from DMRJ to
2 Mr. Small, requires that DMRJ be made a party.

3 THE COURT: Why?

4 MR. GLUCK: Because the obligation to pay is that of
5 DMRJ. While quite right, the comptroller, the CEO, in this
6 case, the manager, makes that decision ultimately, either
7 voluntarily or pursuant to a court order, it is DMRJ that is
8 liable if Mr. Small's claims are proven true. And what
9 Mr. Small has done is sue for a TRO remedy that is capable of
10 being affected just against the manager. But in terms of his
11 relief, his final relief, wherefor it is requested, his relief
12 requested is as against DMRJ and its assets.

13 THE COURT: Now, if the plaintiff were to sue --
14 continue with this suit and lose on the merits, could the
15 plaintiff -- could Mr. Small lawfully proceed to judgment in an
16 action against DMRJ?

17 MR. GLUCK: He could sue DMRJ for his rights under the
18 operating agreement in the absence of Mr. Trott as well, yes.

19 THE COURT: And would you have the benefit of
20 collateral estoppel or issue preclusion?

21 MR. GLUCK: In this case, your Honor, I think the only
22 correct answer is that both parties would need to be joined.
23 The hypothetical you gave me was yes. But in this case, your
24 Honor, the managers of DMRJ will be appearing or intervening
25 voluntarily and, therefore, I think the outcome of collateral

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1 estoppel -- we're going to be defending this fairly swiftly.

2 This is not any sort of game to proceed with one set of
3 defenses and then bring another set of defenses after a ruling.

4 THE COURT: Well let's talk about game. There was a
5 books and record demand under Delaware law. Why haven't you
6 honored it?

7 MR. GLUCK: There's a very good reason.

8 THE COURT: That's what I want to hear.

9 MR. GLUCK: Mr. Small is believed to be a security
10 risk in this case. This is a liquidation concerning one of the
11 most serious and significant fund collapses in history. The
12 fund is insolvent. And I'm talking about Platinum Partners
13 Value Arbitrage fund now, PPVA, the sole member that is not a
14 profits interest member of DMRJ.

15 Now what's public information, what is in the record
16 of this Court, is that this was a fund with a purported net
17 asset value of 1.4 billion.

18 Now, net is important because it meant that the
19 equity, the shareholders of Platinum, or their collective
20 shares combined, were worth of profit of 1.4 billion.

21 It is also a matter of public record and within this
22 action that as a matter of fact PPVA doesn't really not have
23 that. It is insolvent. There is no circumstance where the
24 shareholders will ever realize anything, including with respect
25 to significant litigation.

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1 THE COURT: Isn't that a chicken and an egg situation
2 in terms of your ability to show that?

3 So, Mr. Small says: So you say, this is why I want to
4 exercise my right under Delaware law which gives me the right,
5 for example, to the LLC's federal state and local income tax
6 returns for each year.

7 What's the security risk there?

8 MR. GLUCK: I'll explain it.

9 There are two. Firstly, what the liquidators are
10 doing with assets of DMRJ are not subject to public inspection
11 under normal circumstances. There is no question that
12 Mr. Small under -- absent the extraordinary circumstances in
13 this case --

14 THE COURT: Do you have a Delaware case that stands
15 for that proposition?

16 MR. GLUCK: That under extraordinary circumstances a
17 valid request for records should be denied when there is a
18 security risk?

19 THE COURT: No. No. No. You just added two
20 different things. Extraordinary circumstance and security
21 risk. You can give me a case on both if you have one.

22 MR. GLUCK: Sure. I'll be happy to provide the case.

23 THE COURT: I assume you looked for this before you
24 walked into court today. You have to have researched this.

25 MR. GLUCK: What we said is that we would be happy to

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1 provide the finances of DMRJ to this Court in camera for a
2 variety of reasons.

3 THE COURT: And what would I do with it, by the way?

4 MR. GLUCK: You would see that there is so much cash
5 at DMRJ but also contingent liability.

6 THE COURT: How does that vindicate the member of the
7 LLC's right to see that information, by showing it to me?

8 MR. GLUCK: I'll explain why. The persons claiming
9 the rights to the very proceeds, the profits of which Mr. Small
10 is claiming, are insiders including but not limited to the --
11 an entity owned by the former president of Platinum Management.
12 At all times -- and this will lead to my point one, in terms of
13 has there been a showing of either prospective harm or
14 irreparable injury -- at all times the liquidators have and are
15 maintaining complete and full reserves in respect of each and
16 every known contingent claim against DMRJ. Mr. Small's claim
17 has been known for a long time.

18 THE COURT: Let me ask you this.

19 MR. GLUCK: And if the numbers, while there is no
20 current relationship between the amount that is being held and
21 the amount that is required to satisfy a sufficient reserve in
22 Delaware, that sort of information could provide third parties
23 with information that could lead them to determine our internal
24 evaluations of their claims against DMRJ.

25 THE COURT: Your offer sounds pretty hollow to me

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1 because what am I supposed to do with the information? What if
2 it's not as you advertise it?

3 MR. GLUCK: We can provide it in its perfect form.
4 There's not much there. DMRJ --

5 THE COURT: Well, wait a minute. The current list of
6 the name and last known business residence or mailing address
7 of each member in management.

8 MR. GLUCK: That can be provided but that isn't what
9 was asked for.

10 THE COURT: It was not asked for?

11 MR. GLUCK: No, no. What was asked for were the
12 financial records, a listing of assets and a listing of
13 liabilities. And what I am suggesting to this Court --

14 THE COURT: Where do I find in the record the books
15 and record demand?

16 MR. GLUCK: It would likely be in the complaint.

17 MR. COHEN: Your Honor, if I may, there is Exhibit --
18 I believe it is Exhibit L to my declaration.

19 One moment.

20 (Pause)

21 Exhibit K to my declaration is the demand for the
22 books and records.

23 THE COURT: Can you hand that up to me, please, if you
24 don't mind.

25 MR. COHEN: Let me also, your Honor. Show you the

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1 operating agreement's language, which is Exhibit D to my
2 declaration. That's Exhibit K. That's Exhibit D.

3 Your Honor, if I could direct your attention to page
4 14 of Exhibit D which is the operating agreement and
5 specifically 11.1C.

6 THE COURT: I quoted it to you before. I cited it to
7 you before.

8 MR. COHEN: Yes.

9 THE COURT: That wasn't the question I asked. I asked
10 for your books and record demand.

11 11.1C says that you have the right from time to time
12 at your expense to have your accountants and representatives
13 examine and/or audit the books and records of the company.

14 That's not what I asked you. I asked for the books
15 and record demand under Delaware law that you transmitted.

16 MR. COHEN: That is Exhibit -- I believe the Exhibit I
17 just gave to you.

18 THE COURT: Exhibit K?

19 MR. COHEN: Exhibit K.

20 THE COURT: This seems to be a demand under 11.1C.

21 MR. COHEN: Your Honor, Delaware law, all Delaware law
22 requires is a written demand that gives a basis for the demand,
23 that gives a legitimate basis for the demand.

24 THE COURT: You did. The basis was the operating
25 agreement.

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1 MR. COHEN: Yes. Under Delaware law that's a
2 legitimate demand.

3 THE COURT: So is your claim for breach of the
4 operating agreement or is it a claim under 6 Section 18-305(a)
5 of Delaware law?

6 MR. COHEN: We seek both forms of relief, your Honor.

7 THE COURT: But you didn't make a demand under the
8 books and records provision of Delaware law.

9 MR. COHEN: Your Honor, I don't believe that Delaware
10 law requires that you specifically cite the Delaware statute in
11 order to make a demand. It requires that a demand be made.

12 THE COURT: Well I'm trying to tie your demand in to
13 the provisions of the Delaware statute. The Delaware statute
14 doesn't have a provision that says produce the books and
15 records. You know that. It doesn't say that.

16 MR. COHEN: I understand that.

17 THE COURT: So I'm trying to find out what you
18 demanded under the Delaware statute.

19 MR. COHEN: If I may refer to the -- the demand in
20 front of you references the materials in 11.1C. Those books
21 and records, what is required --

22 THE COURT: Actually, what it says is in order to
23 assist Mr. Small in determining the full amount of his profits
24 entitlement pursuant to the DMRJ operating agreement, we also
25 request on behalf of Mr. Small that this firm be given access

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1 to the books and records of DMRJ for examination purposes
2 pursuant to Section 11.1C. of the DMRJ operating agreement.

3 I'm trying to figure out what under Delaware law you
4 were seeking. And with regard to 11.1C you have the right to
5 have your accountants and/or representatives examine and/or
6 audit the books and records of the company. So you may be
7 entitled to it under 11.1C of the operating agreement. And
8 that's part of your breach of contract claim, correct?

9 MR. COHEN: It's a separate claim, but yes.

10 THE COURT: All right. Go ahead.

11 MR. GLUCK: I think I can represent to the Court,
12 having just read this, it was our express understanding that by
13 the phrase "books and records" they were not seeking a
14 membership list, which we would be happy to provide them. In
15 fact, when I get to a technical point about this caption, we
16 would be happy to and we will now.

17 What we understood that they were looking for was an
18 accounting of all revenues and liabilities.

19 THE COURT: But they're entitled to an audit actually.

20 MR. GLUCK: Excuse me?

21 THE COURT: They're entitled to an audit at their
22 expense.

23 MR. GLUCK: They're entitled to an audit at their
24 expense.

25 THE COURT: And do you have any intention to deny them

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1 that right?

2 MR. GLUCK: We do.

3 THE COURT: Have you denied them that right?

4 MR. GLUCK: We intend to deny them that right because
5 of a genuine concern under the circumstances of a large
6 liquidation that when they see, in particular, the assets of
7 DMRJ that are being held both temporarily and permanently, in
8 conjunction with the known liabilities of DMRJ, that our
9 internal impressions as to the reasonable value in compliance
10 with the very obligations that Mr. Trott has suggested and
11 sworn he will uphold will become available and knowable to not
12 merely Mr. Small but those persons, those entities and persons
13 who have made similar claims and, therefore, provide them with
14 information as to what we think they're worth. And for this
15 reason -- if it was a question of assets alone and Mr. Small's
16 claim was the only claim out there --

17 THE COURT: How does that provide a defense under the
18 agreement, the fact that this information can be used to the
19 distinct disadvantage of DMRJ? How does that provide a
20 defensible --

21 MR. GLUCK: Because as a profits interest member of
22 DMRJ he similarly, Mr. Small, similarly has an obligation to
23 act in the best interests of DMRJ. And this particular request
24 is incompatible with acting in the best interests of DMRJ.

25 THE COURT: So you would have this Court construe

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1 11.1C as saying you have the right to this audit but only if
2 the audit is in the best interests of DMRJ? Is that your
3 position?

4 MR. GLUCK: I would take a different position.

5 He has the right to an audit. But in a unique
6 circumstance like this case, and it is a unique circumstance,
7 the requested audit absent extraordinary measures of safeguards
8 would have the result of detriminting DMRJ. And in this
9 circumstance -- and I'm not aware of another one that I've
10 had -- in this particular circumstance they're incompatible.

11 THE COURT: Now let me ask plaintiff's counsel. Would
12 you agree to a protective order that this information could
13 only be used by Mr. Small and only in this action?

14 MR. COHEN: Absolutely, your Honor.

15 THE COURT: OK. Thank you.

16 Would that take care of it, punishable by contempt of
17 court for a violation?

18 MR. GLUCK: For a violation, and perhaps with an
19 attorneys' eyes only provision, it would be acceptable if
20 Mr. Small's attorney were to see it. There is a genuine
21 concern in this case, and it has happened --

22 THE COURT: It provides for an audit by accountants.
23 Are you an accountant? Let me ask plaintiff's counsel. Are
24 you an accountant?

25 MR. COHEN: No, your Honor.

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1 MR. GLUCK: I would include accountants within that
2 caveat.

3 But there have been instances in this case, including
4 with respect to a duly constituted liquidation committee, where
5 someone had to be removed for expressly violating a court order
6 NDA.

7 THE COURT: Was it Mr. Small?

8 MR. GLUCK: It was not Mr. Small. It was not.

9 But that stems from the concern. Frankly, we believe
10 that the major issue here, this request for a TRO -- Mr. Small
11 has every right to sue. We have divergent opinions about
12 whether he is entitled to a receive a profit distribution. And
13 it turns on the interaction between his investment management
14 agreement and whether he breached that agreement as well as
15 caused damages and managed an asset with zero value that more
16 than dwarfs any recovery that he's entitled to. But that's not
17 what he's done.

18 There are parties who have similarly sought recoveries
19 from Implant Sciences with claims against DMRJ who have
20 similarly either noticed their claims in writing, in some cases
21 far more money, or have filed complaints and that haven't.
22 They have every right to do it. The managers have not merely
23 the right but the obligation to defend such claims if they
24 think it is appropriate, and it is appropriate here. And but
25 for this TRO, a normal litigation just like two other

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1 simultaneous litigations involving DMRJ and purported claims to
2 these proceeds are ongoing. What's at stake here is whether
3 the test for a TRO has been satisfied and, as the Court alluded
4 to in the first instance, whether a TRO is, in fact, available
5 in connection with a claim for money damages. And we think,
6 your Honor, in connection just with that first question the
7 possibility of irreparable harm, there has been no showing
8 because the harm alleged is fictitious and it is inherently
9 reparable.

10 This is what happened here. Mr. Small, who is not the
11 only profit interest of DMRJ, made a request for a payout of
12 his profits. He was told that actually the profits -- and,
13 remember, we received the cash in 2017, there is no question
14 about that -- was the subject of competing creditor claims.
15 Creditors get paid before certainly profit interest members and
16 before us. And that there would be no way to know what he
17 would be entitled to. However, he was assured by court
18 fiduciaries that the very Delaware laws that protect persons in
19 Mr. Small's position, as well as the other public contingent
20 creditors out there -- Westepox being one of them, another
21 company named Beechwood being another -- would be abided by.

22 THE COURT: What I didn't hear you say, though, is
23 that you would treat Mr. Small the same as and make payouts to
24 him to the same extent as you would to any other member of the
25 LLC entitled to a payout.

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1 MR. GLUCK: Absolutely right.

2 What we said was that your rights to a payout is
3 disputed. It's disputed. And, in fact, it was Mr. Small's --

4 THE COURT: So you intend to treat him differently,
5 not the same as other members of the LLC?

6 MR. GLUCK: We intend to treat him similarly to any
7 other creditor or member of the LLC for whom the right to
8 payment is disputed.

9 THE COURT: Well I'm not -- you do not intend to treat
10 him similarly to any other member of the LLC.

11 MR. GLUCK: We do.

12 THE COURT: Is that correct?

13 MR. GLUCK: There are three members of the LLC.

14 THE COURT: Is that correct?

15 MR. GLUCK: Incorrect.

16 THE COURT: OK.

17 MR. GLUCK: There are three members of the LLC. And I
18 believe the correct term is member. And then there are two
19 profit members. I'll say three members for shorthand.

20 The member of DMRJ is PPVA. And to the best of my
21 knowledge, there is no dispute that that member is entitled to
22 dividends or profits in due course.

23 The two profit members of the LLC, both of whom have
24 been indicted, are being treated exactly the same and, in fact,
25 they're being treated exactly the same as each and every

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1 creditor who have a priority right to payment where rights to
2 payment are being disputed.

3 THE COURT: Now help me out here because I haven't
4 heard it yet today. What does an indictment or even a
5 conviction of the charges in the Eastern District indictment
6 have to do with Mr. Small's entitlement to relief under an
7 agreement with DMRJ?

8 MR. GLUCK: The exact question. This is what made
9 us --

10 THE COURT: Well, try answering it, rather than how
11 you reacted when you first thought about the question, just
12 give me the answer.

13 MR. GLUCK: Sure. The indictment in question charges
14 Mr. Small with engaging in a conspiracy with an affiliated
15 company, in fact, what we believe is an alter ego company,
16 called Beechwood, to syphon money from this entity Black Elk
17 which was one of the investments under Mr. Small's purview.

18 THE COURT: Stop right there.

19 Was it an investment under his purview as the
20 investment manager for DMRJ?

21 MR. GLUCK: No.

22 THE COURT: OK. So why are you talking to me about
23 this?

24 MR. GLUCK: Because of the investment management
25 agreement. Under the investment management agreement --

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1 THE COURT: Who were the parties?

2 MR. GLUCK: Platinum Management, which is a management
3 entity charged with engaging in the operations of --

4 THE COURT: Was DMRJ a party?

5 MR. GLUCK: No.

6 DMRJ, as well as other subsidiaries of funds opted and
7 managed by PPVA provided consideration -- theoretical
8 consideration in the form of these profit interest memberships
9 to Mr. Small and others. The management agreement provided
10 that he would be entitled to the lesser, the lesser -- and this
11 is the critical portion -- the lesser of the realization's
12 profits across his entire portfolio, or the percentage
13 allocation in, for example, the DMRJ agreement or the PPVA
14 agreement.

15 And one of our defenses, which will be more fully
16 articulated after our answer and some litigation in some court,
17 is that Mr. Small violated a, his breach -- breached the
18 investment management agreement issue that gave rise to the
19 issuance of the profit membership interest in DMRJ on the one
20 hand; and that, secondly, that same agreement contemplates a
21 portfolio-wide analysis of profits. And so if money was --

22 THE COURT: Where do I find in the DMRJ agreement a
23 reference to portfolio-wide profit being the standing?

24 MR. GLUCK: You won't. You'll find it in the
25 investment management agreement which is designed to be read in

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1 contention with the DMRJ -- excuse me, in conjunction with the
2 DMRJ operating agreement. We will prove this.

3 This is the basis for the very calculations that
4 Mr. Small's counsel has been talking about within this award.
5 They looked at a portfolio-wide basis. Unfortunately, at the
6 time that portfolio had been represented to have a certain
7 value and then a certain realized value that over the past two
8 years has been determined to be false. But here is what's been
9 alleged here.

10 THE COURT: And that agreement is before me?

11 MR. GLUCK: That agreement, the investment management
12 agreement is before you.

13 THE COURT: Where is it?

14 MR. GLUCK: It is attached to the Trott declaration.
15 We'll find the exhibit in just a second.

16 THE COURT: I'm going to ask you to show me where the
17 provision is that says the interest or the profit interest in
18 any particular vehicle such as DMRJ is to be reduced to the
19 lower of the portfolio-wide profits or the profit of that
20 entity.

21 MR. GLUCK: Sure. It's section 3(b) of the agreement
22 and if you'll just allow us a minute to find that particular
23 page.

24 THE COURT: What exhibit is the agreement?

25 MR. GLUCK: Exhibit 5.

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1 Section 3 is entitled compensation. Section 3(b) and
2 (c) bonus and loss carry forward, that's the titles, are
3 applicable here.

4 THE COURT: This is the agreement that was the subject
5 of the arbitration before Judge Katz?

6 MR. GLUCK: Correct.

7 THE COURT: And so do you contend that the arbitration
8 provision in this agreement is incorporated into the DMRJ
9 agreement?

10 MR. GLUCK: No. No.

11 But what we do contend that this is the very agreement
12 by which the grant of the profit -- and I don't believe this is
13 disputed --

14 THE COURT: Well show me the provision. I'm looking.

15 MR. GLUCK: Sure. It's at page four.

16 THE COURT: I'm on page four.

17 MR. GLUCK: Subsection 3. At the top of the page
18 there's a 5 of 16. Document 30-5.

19 THE COURT: I'm on page four. Is that what you're
20 referring to?

21 MR. GLUCK: Page four at the bottom?

22 THE COURT: Where do you find the language. Under
23 which subdivisions? I can see three.

24 MR. GLUCK: (b) bonus.

25 THE COURT: (b) bonus.

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1 MR. GLUCK: (b) bonus. "The Portfolio Manager shall
2 also receive a bonus for each calendar year (the "Bonus") equal
3 to (I) the product of (A) the Bonus Percentage multiplied by
4 (B) the net profit for such calendar year, reduced as described
5 below for any applicable loss carryforward amount, the amount
6 of base salary paid to the portfolio manager with respect to
7 such calendar year..." and this is it "...the aggregate amount
8 of profits allocated to the portfolio manager with respect to
9 the profit interests." That profit interest is this profit
10 interest in the DMRJ agreement. "...for such calendar year
11 provided that the calculation under this clause shall (III) be
12 done by excluding allocations to the profit interests to the
13 extent that they don't correspond to the realized amount."

14 Now, it goes on.

15 THE COURT: Just give me a second now.

16 MR. GLUCK: Then I'm going to refer the Court to a
17 second page which will be important.

18 THE COURT: All right. Because I'm not getting it out
19 of that.

20 Go ahead.

21 MR. GLUCK: And so that profit interest, capitalized
22 term, is the very profit interest we are here in this court
23 discussing today. It's not just this profit interest. It is
24 also other profit interests under -- with respect to
25 investments under Mr. Small's purview.

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1 And then I will also refer the Court to page 9 --

2 THE COURT: So (m) on page 3, 1(m) defines profit
3 interests to include profit interest issued to the portfolio
4 manager by DMRJ Group LLC.

5 MR. GLUCK: Correct.

6 THE COURT: Go ahead.

7 MR. GLUCK: Your Honor, as to everything we've just
8 suggested in terms of that this is the profit interest, I don't
9 believe there's any dispute between the parties.

10 THE COURT: OK. Go ahead.

11 MR. GLUCK: I'm also going to refer the Court to
12 Article VIII of the amended DMRJ, which is Exhibit A to the
13 amended complaint -- D to the amended complaint, excuse me.
14 I'm sorry, your Honor. D to the Cohen declaration.

15 THE COURT: What does it say?

16 MR. GLUCK: It says, "Subject to Section 8.4 hereof,
17 net profits of the company shall be allocated to members as
18 follows: 90 percent to Platinum Partners Value Arbitrage fund;
19 6.5 percent to the first profit interest member," that is
20 Mr. Small in this case, and this is critical, "...or if a
21 lesser amount of his adjusted profits amount." And then it
22 goes on to say, "The initial adjusted profits amount shall be
23 calculated separately for each promised profits interest member
24 as equal to the bonus defined in the IMA," which we just read.

25 THE COURT: What page are you on now?

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1 MR. GLUCK: Page 9 of the LLC agreement.

2 THE COURT: Hang on now.

3 MR. GLUCK: Section 8.2.

4 THE COURT: I got it. "Or if a lesser amount his
5 adjusted profits amount."

6 MR. GLUCK: Yes.

7 THE COURT: All right. OK.

8 MR. GLUCK: For that reason, because of the
9 relationship between the Small profits agreement and the Small
10 profits interest, we believe there is a very strong defense
11 that at a minimum the losses associated with Mr. Small's other
12 investments must be netted down. But we also have two other
13 arguments that are set forth in our papers.

14 First, a breach of Mr. Small's portfolio management
15 agreement. He engaged in tortious conduct and violated its
16 good faith provisions and, specifically, that tortious conduct
17 resulted not only in losses that would be defined as being
18 calculable via a market, but a class of tort creditors as
19 against the Black Elk investments and PPVA other investments.
20 Those tort creditors, along with contract creditors, are in
21 excess of \$600 million.

22 These are the defenses. And these go to the
23 requirement here that a probability of success be shown by
24 Mr. Small in relation to his application for an injunction.

25 Turning to the first requirement, which both parties

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1 concede is the most important one, he needs to show the
2 existence of both harm, imminent harm and that it needs to be
3 irreparable. And in this context Mr. Small's argument fails
4 entirely. We have here sitting in this courtroom --

5 THE COURT: Now that you've explained the relationship
6 between the IMA and the agreement specifically relating to DMRJ
7 and the fact that it's the IMA that gives you the right to
8 reduce the compensation; is that right?

9 MR. GLUCK: That's correct. With the lesser language.

10 THE COURT: It's clear to me that you could arbitrate
11 this if you wanted to do so.

12 MR. GLUCK: If we wanted to do so.

13 THE COURT: And it's clear to me you could raise
14 necessary party if you wanted to do so.

15 MR. GLUCK: In the form of Platinum Management I
16 believe so.

17 THE COURT: Well in the form of DMRJ in this action.

18 MR. GLUCK: I agree.

19 THE COURT: So I think there's a little bit of
20 manipulation of forum by both sides in this case.

21 MR. GLUCK: Let me explain.

22 THE COURT: You have a right to arbitrate but you
23 didn't like how it went the last time in arbitration, right?

24 MR. GLUCK: No. I wouldn't say that because -- for
25 two reasons. One is no, the arbitration was conducted by, on

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1 the one hand, Platinum Management using values and profits that
2 we know, based on two years of investigation, were incorrect
3 and disregarded, for example, the class of tort creditors that
4 I have just suggested to you; and B, and this is the important
5 one -- I understand the Court's point about subject-matter
6 jurisdiction. DMRJ, the entity, is a Delaware LLC. The issue
7 of whether and what citizenship it is is presently the subject
8 of litigation in a companion case involving precisely these
9 profits. The test seems to be that when you have an LLC you
10 need to go backwards until you find an actual human person or a
11 corporation.

12 THE COURT: For a diversity jurisdiction.

13 MR. GLUCK: For diversity.

14 THE COURT: That's pretty well established and has
15 been for quite some time.

16 MR. GLUCK: That's correct. And the simple answer is,
17 having spent significant funds, it is unclear what the
18 citizenship of DMRJ is for diversity purposes. It is unclear.
19 We are continuing in federal court now. In this other case it
20 was removed. We suggested to them that maybe it wasn't a good
21 idea because subject-matter jurisdiction would be unclear. The
22 court ordered jurisdictional discovery, which is totally
23 inconclusive.

24 We are not playing any games whatsoever.

25 THE COURT: Well I heard you say you plan to raise

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1 Rule 19 in your answer.

2 MR. GLUCK: Yes.

3 THE COURT: And you can leave it there.

4 MR. GLUCK: Yes.

5 THE COURT: And you're not going to touch it.

6 MR. GLUCK: That's right.

7 THE COURT: And you're just going to wait until final
8 judgment. And then if you don't like it, you're going to
9 say --

10 MR. GLUCK: No.

11 THE COURT: -- that there was a failure to join an
12 indispensable party.

13 MR. GLUCK: I don't think --

14 THE COURT: You don't want to touch it because you're
15 afraid it's going to be granted.

16 MR. GLUCK: I don't think so. I think --

17 THE COURT: So why don't you make a motion to dismiss
18 under Rule 19.

19 MR. GLUCK: We may in our answer. But what happened
20 here is that a few weeks ago we were presented with X, in
21 light -- in the --

22 THE COURT: When is your answer due?

23 MR. GLUCK: Excuse me?

24 THE COURT: When is your answer due?

25 MR. GLUCK: September 18.

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1 What happened here is that in the face of both oral
2 and written communication with Mr. Small, in which he was
3 guaranteed that an officer of the court, recognized by Chapter
4 15, was absolutely abiding by his duties to maintain adequate
5 reserves in respect of all persons.

6 THE COURT: Who represents DMRJ in the United States?

7 MR. GLUCK: Holland & Knight. Myself.

8 And he was sent this --

9 THE COURT: So DMRJ could assert its right to have
10 this action dismissed. DMRJ could say that it is exposed to
11 jeopardy from a second action. But you're holding back on that
12 because you're trying to figure out whether you like it in
13 federal court.

14 MR. GLUCK: Quite the opposite. We filed our original
15 complaint in the other case in state court.

16 THE COURT: No. But --

17 MR. GLUCK: I know. I don't think that thought has
18 ever crossed our mind.

19 THE COURT: Well if the plan of action is to raise
20 indispensable party in your answer but to never file a motion
21 on it, then I know what the game is.

22 MR. GLUCK: I wouldn't say that's the plan at all.

23 We are here under --

24 THE COURT: Well you did kind of say it was the plan
25 and then you backed off. You kind of said that was the plan

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1 twice, I think. On the record. You can go read the
2 transcript.

3 MR. GLUCK: If I said that, it was a mistake because
4 our answer may be a motion to dismiss instead, I don't know.
5 It is something that we need to investigate.

6 Here is what I do know.

7 THE COURT: It's been upgraded to it's going to be in
8 our answer but we're not going to move to it's going to be
9 either in our answer or we may move. That's the upgrade.

10 MR. GLUCK: Your Honor, I understand what the Court is
11 saying. And I am telling you that not for one second had I or
12 any member of this team considered the issue of federal or
13 court state forum in this case in any component of the
14 strategy.

15 THE COURT: Did you read my order which raised the
16 indispensable party?

17 MR. GLUCK: We did.

18 THE COURT: What did you do about that?

19 MR. GLUCK: I read the order.

20 THE COURT: And you found it very interesting?

21 MR. GLUCK: My actual thought was that it was
22 referring to whether DMRJ, the person to pay, was an
23 indispensable party.

24 THE COURT: Correct. It was.

25 MR. GLUCK: I think the answer is yes.

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1 What it did not trigger, especially in light of the
2 subject-matter jurisdiction, which I said is very unclear, is
3 that this Court was inferring or requesting us -- and now I
4 do -- to consider the issue of which court this action ought to
5 be in. Absolutely not.

6 Today is the first time that I understand that. I
7 will tell you the chronology here is that we, in the face of
8 both written and oral communications with Mr. Small, under
9 circumstances where he was promised that -- by a fiduciary, a
10 court-appointed fiduciary -- that Delaware law and reserve
11 requirements would be complied with in respect to his claim, I
12 received an e-mail containing attachments on an afternoon a few
13 weeks ago. Those attachments sought an ex parte TRO,
14 prospectively the relief here; that the hearing schedule
15 conflicted with the two babies the persons on this table were
16 going to have within two weeks of each other, made the proposal
17 that rather than briefing this on an emergency or expedited
18 basis that we agree to keep whatever it was, \$5 million, until
19 their preliminary motion could be decided. We then each had
20 our babies, prepared these papers, and we sit here today. That
21 is why I don't want to bind my client.

22 The Court asked me a question. Do I think DMRJ is a
23 necessary party? Standing here today, I think the answer is
24 yes. Have we done any research or analysis on it? The answer
25 is no. We need to before September.

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What we're standing here today about is a request --

THE COURT: I'll keep that in mind next time I draft an order I should make it explicit that the parties should brief it. I failed to do that.

MR. GLUCK: I apologize.

THE COURT: And that was my fault.

MR. GLUCK: I absolutely apologize and I did not realize, again, perhaps because of the difficulties that exist with subject-matter jurisdiction and DMRJ, that subject-matter jurisdiction was at all within the intent of the Court's inscription. I can tell you that right now. And that's one of the reasons you can tell we're thinking about it live here.

What we did do is examine Mr. Small's request for a preliminary injunction and found that it was infirm in all possible respects. And the one I would like to go to is this irreparable harm component. It has to be imminent irreparable harm.

Mr. Small, other than saying the liquidators dispute his claim, has provided no evidence whatsoever to suggest that appropriate reserves would not be held in Delaware. The only things they point to is a suggestion that DMRJ funds would be used. From, by the way, a report that's a year-and-a-half ago, after they received all the assurances.

But even there, there is nothing incompatible about the utilization of DMRJ funds and the adherence to Delaware law

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1 in respect of Mr. Small's claims and every other claim out
2 there. Both can be done. There are tens of millions sitting
3 in my Holland & Knight escrow account alone. Adequate reserves
4 are in place. Some of that money can be used while absolutely
5 maintaining the appropriate level of reserves that are
6 necessary. There are a number of claims against DMRJ. If any
7 one of those claims is successful, it will reduce Mr. Small's
8 interest. We are defending them in part on his behalf if he is
9 successful and also on behalf of the other members of DMRJ.

10 But there is no suggestion here that DMRJ is
11 insolvent, which does lead to the *Grupo Mexicano* issue. There
12 have been some cases suggesting that in extraordinary emergency
13 situations where there is insolvency and money is about to be
14 dissipated from the jurisdiction with no possibility of relief,
15 that that restriction -- at least the state courts felt this --
16 can be lifted. But that's not this case. Those exceptions
17 don't apply. We have someone who is subject to the
18 jurisdiction not only of this Court but the Chapter 15 Court.
19 We have a court officer who has pledged to maintain adequate
20 reserves. If ever those reserves -- by the way now it's wholly
21 solvent; there is no risk of anything -- if ever those
22 reserves, if it would to ever come to light that those reserves
23 were inadequate for whatever reason, DMRJ could be
24 recapitalized. The intent on using the funds as much possible,
25 yes, we can use the funds that are clearly excess, that's the

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1 most basic test, beyond the maximum scope of claims against
2 DMRJ. And then there is a more subtle test which suggests we
3 need to make appropriate provisions. There are also assets of
4 DMRJ that are not cash. There are also litigation claims of
5 DMRJ. All of this we are happy to do.

6 We knew that Mr. Small's profit interest claim would
7 have to be dealt with at a certain point. He's in the midst of
8 a trial. What we suggested to him is to hold off. Why don't
9 we see what the profits actually look like, what the outcome of
10 the trial is; not that it's dispositive. Because if it --
11 there are certain rulings, it will strengthen the case that the
12 IMA was violated and strengthen the case that as a result of
13 the breach of fiduciary duties this class of tort creditors
14 were created. But the civil standards and criminal standards
15 are totally different.

16 What's totally absent here is any indication, any
17 evidence whatsoever that is meaningful that there is going to
18 be dissipation that is wrongful. And the accusation is not
19 being made against Joe Schmo but against a court-appointed
20 fiduciary. And, again, when they say: Look, they're going to
21 use DMRJ funds, I asked them: What in any way is incompatible
22 with that and maintaining reserves?

23 I will submit to the Court that's exactly what's being
24 done. And the amount of those reserves, the minimum amount of
25 those reserves, and the nature of those calculations are

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1 precisely the information we don't want getting into
2 third-party hands.

3 So on an irreparable harm front there is none. That's
4 the dangerous thing. That's why I say the danger here is
5 fictitious.

6 The second component is it has to be irreparable. And
7 here it's reparable. Let's just say that a mistake was made.
8 Let's say at the end of the day a year from now, whenever,
9 after all due process is had, that Mr. Small is entitled to
10 everything that he is suggesting he is entitled to. In that
11 event, if there were insufficient funds or insufficient
12 determinations had been made as to the appropriate reserves of
13 DMRJ, Mr. Small would have a clear recourse. Delaware
14 statutes, the law, and his own fiduciary obligations as a
15 member clearly provide for this. And for that reason the
16 irreparable harm portion is wholly absent here.

17 Now I think we've talked about the defenses that we
18 have that we think are very strong. And it's not based on
19 sheer speculation. Sitting before you, and the author of the
20 Trott declaration before you, is based upon the investigation I
21 conducted over 18 months, part of which has spilled over into
22 discovery litigation in the bankruptcy court that this court
23 has been referred to in the papers, discovery litigation
24 involving CohnReznick and millions of documents. Here are the
25 conclusions: That PPVA is totally insolvent; that the 1.4

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1 billion valuation, it's not just zero, it's negative. And one
2 of the reasons it's negative is because Mr. Small's actions,
3 which happen to be alleged by the SEC and the U.S. Government
4 but have been separately confirmed within this investigation,
5 it has been represented to you, create an entire class of tort
6 creditors. If the assets had just been worthless, the net
7 should be zero. Now we're in negative territory. And those
8 actions constituted a breach of Mr. Small's IMA. Now, PPVA may
9 have its own claims. That's not before this Court.

10 But one and two, irreparable harm, being totally
11 absent; and two, the probability of success on the merits, the
12 plaintiff has not demonstrated; in fact, quite the opposite.
13 And I think it is very worthwhile for this Court to consider
14 the unique posture of Mr. Small's request here. This Court has
15 been made aware that there are other creditors of DMRJ,
16 purported creditors, right. There's ongoing litigation. Some
17 have simply made letter demands like Mr. Small but they haven't
18 resulted in litigation. The sole person -- and if of them,
19 they've all received this letter saying we're going to use DMRJ
20 funds. No one has dared suggest, based on a letter saying
21 we're using DMRJ funds, in the face of unequivocal
22 representations from a court officer that appropriate reserves
23 have been made, seek an injunction. What they're entitled to
24 is appropriate reserves.

25 THE COURT: That's not a very strong argument. No one

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1 else has done what Mr. Small has done. That's your argument.

2 MR. GLUCK: Under similar circumstances.

3 THE COURT: That's not very probative of anything.

4 MR. GLUCK: They would theoretically --

5 THE COURT: In my opinion, sir.

6 Move on to your next argument.

7 MR. GLUCK: Next argument.

8 Point one. Irreparable harm. There is no harm.

9 THE COURT: By the way, do you have this in the case
10 law that a court should look to see whether other people have
11 sought the relief and if no one else has sought the relief then
12 it's probably not good relief to be seeking?

13 MR. GLUCK: No. But I would suggest that it goes to
14 the validity of the harm that's being suggested.

15 THE COURT: What other people have chosen to do?

16 MR. GLUCK: What has been suggested here today in this
17 courtroom --

18 THE COURT: No, no. I'm asking you. That was a
19 question for you.

20 MR. GLUCK: My answer to you --

21 THE COURT: Go ahead. Thank you. Go ahead.

22 MR. GLUCK: What has been suggested today here in this
23 courtroom is that because the liquidators, the managers of
24 DMRJ, have rejected Mr. Small's claim, there is an inherent
25 security risk there, there is -- that inherently means they

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1 have no intention of paying reserves.

2 What I am suggesting to you is that there are many
3 other claims that the liquidators have similarly rejected.
4 That is what I am saying. And, therefore, what I am saying is
5 the argument that denial of a claim is grounds for irreparable
6 harm is specious. That's what I'm saying.

7 So we have irreparable harm. It's neither imminent.
8 It's been promised by an officer of the court that there will
9 be reserves. And it's reparable in any event because both the
10 common law, the contract, and the rights provide for remedies
11 in any sort of situation that Mr. Small is suggesting.

12 The third issue is the public interest. In this case
13 it is a significant case. It's a high profile case. The
14 public interest weighs in favor of the liquidators. It weighs
15 in favor of the liquidators for the very same reason that they
16 were granted rights of discovery and rights of recognition
17 under very difficult circumstances. They are conducting a
18 liquidation of a purported billion dollar fund without former
19 management assistance. And the discretion -- their discretion
20 to utilize funds and assets within the subsidiaries as they see
21 fit is in both the private interests of the parties here and
22 the public interest. What Mr. Small is seeking is an
23 injunction three times the amount of his claim. Your Honor,
24 neither of the three components have been met here.

25 That is our submission, if the Court has any other

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1 questions.

2 THE COURT: Thank you.

3 Mr. Cohen.

4 MR. COHEN: Your Honor, I'll address a few of the
5 points here.

6 First of all, with respect to defendants' failure to
7 provide the books and records, I will note that there is a
8 protective order in the criminal case in which Mr. Small is a
9 party. He has been entitled to have access to and review
10 millions of pages of records. And there has not been one
11 complaint from the government or any other entity that any
12 provision of that protective order has been violated in any
13 way, shape, or form by Mr. Small. The security risk that
14 defendants cite is a smokescreen. There is no substance there.

15 Mr. Glock basically offered Mr. Small the sleeves to
16 his vest. He said Mr. Trott -- Mr. Trott is behaving in
17 accordance with his fiduciary duties and that repeatedly Mr. --

18 THE COURT: You left out that he's an officer of the
19 court.

20 MR. COHEN: And he's an officer of the court. He's an
21 officer of the court that has refused to abide by a fundamental
22 contractual provision in a contract with absolutely no good
23 reason. He's an officer of the court that has refused, until
24 this very -- until right now, until this very day to even
25 acknowledge -- even tell Mr. Small the range of reserves they

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1 are supposedly contemplating on keeping with respect to his
2 claim.

3 Putting all that aside, Mr. Glock talks about there is
4 no evidence of irreparable harm because the defendants have
5 agreed to keep the appropriate level of reserves. We know what
6 those appropriate levels are, your Honor. Mr. Trott, in
7 paragraph 10 and paragraph 49 of his affidavit, says that in
8 all likelihood Mr. Small is entitled to nothing. So by
9 behaving in his fiduciary duties, supposedly in accordance with
10 his fiduciary duties, the net result will be zero funds coming
11 to Mr. Small. That's where the irreparable harm is, your
12 Honor.

13 Additionally, defendants have stated in page 13 of
14 their opposition brief and at page 21 that they intend to use
15 assets of DMRJ to invest in PPVA assets and to satisfy PPVA
16 obligations. Mr. Small is, in fact, being treated differently
17 than other members of DMRJ. The defendants are refusing to
18 abide by their contractual obligations while taking this money
19 to prop up PPVA and to satisfy PPVA's obligations.

20 THE COURT: All right. We're going to take a
21 five-minute break.

22 (Recess)

23 THE COURT: Sorry, Mr. Cohen. I wanted to give our
24 court reporter a break. You may continue.

25 MR. COHEN: Thank you, your Honor.

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1 Just a few more points here, your Honor. Mr. Glock
2 made a number of different statements regarding the obligations
3 and the duties of defendants, of Mr. Trott, and what they were
4 entrusted with. And at the risk of stating the obvious, the
5 defendants are not liquidators of DMRJ. There is no court
6 order imbuing the defendants with any responsibilities,
7 directly imbuing the defendants with any responsibilities to
8 DMRJ. In fact, one of the central points of the complaint is
9 that defendants, in exercising these duties to PPVA, are
10 violating duties to DMRJ and not acting in accordance with
11 their contractual and fiduciary obligations to DMRJ. So I'm
12 not sure there's any relevance at all to the notion or to the
13 fact that defendants have been appointed by the Grand Court of
14 the Cayman Island.

15 THE COURT: Let me ask you a question. The IMA, now
16 that I've read it, appears to incorporate the profit provisions
17 of the DMRJ agreement at least in part, correct?

18 MR. COHEN: That is correct, your Honor. There is a
19 link.

20 THE COURT: So you have a right to have that claim
21 arbitrated. In fact, you heard opposing counsel say, yeah, it
22 probably is arbitrable, the claim you're asserting here. So
23 are you -- are you waiving your right to arbitration?

24 MR. COHEN: I mean whether a claim is arbitrable or
25 whether arbitration is a possible forum, or whether it's is

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1 mandatory forum are two different questions.

2 THE COURT: I didn't say it was mandatory.

3 MR. COHEN: We have decided to assert the claim
4 against DMRJ -- I mean against the defendants here in this
5 court. There is no arbitration provision in the operating
6 agreement.

7 But if I could make an additional point about the link
8 between the IMA and the operating agreement, and this is where
9 Judge Katz's opinion is particularly important. Judge Katz
10 specifically found, after several days of hearings, that there
11 were net profits in Mr. Small's IMA account. So this
12 directly -- for 2012 through 2014. So this directly
13 contradicts defendants' claims that there are huge negative
14 losses that somehow wipeout any money Mr. Small is entitled to
15 under the DMRJ operating agreement. I believe it was -- it was
16 \$38 million in realized profits -- well, that was with respect
17 to Implant. But, overall, Mr. Small is entitled to \$7 million
18 in bonus compensation precisely because his accounts under the
19 IMA were profitable.

20 Now, defendants have provided no evidence, no evidence
21 that that decision of Judge Katz was based on inflated values,
22 was based on -- was arrived at through -- or was based in part
23 on any of the allegations that are alleged against -- not
24 against Mr. Small but against other individuals in the Eastern
25 District of New York's indictment. Again, no evidence here

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1 that there are any, any losses in Mr. Small's IMA -- in
2 Mr. Small's account under the IMA other than defendants'
3 conclusionary statements that, again, don't even point to a
4 single asset.

5 Finally, I will say that Mr. Glock posited a
6 hypothetical that Mr. Small -- if Mr. Small were to prevail and
7 there were not sufficient funds at the end, that he would
8 somehow have a remedy. And then he stopped. I don't know what
9 remedy that would be. If there's not sufficient funds to
10 recover from DMRJ, there's not sufficient funds to recover from
11 DMRJ. I'm not quite sure what that remedy would be. I don't
12 see it anywhere.

13 And I make one other slightly technical but important
14 point, your Honor; that the profits, whether it's under the IMA
15 or the operating agreement, are decided on a yearly basis, a
16 yearly -- there is no clawback provision in any of these
17 agreements. So they're decided on a yearly basis.

18 So if Mr. Small realized profits in his -- in some of
19 the assets under his accounts in 2012, 2013, 2014, 2015 and
20 some of those assets then incurred losses after that point,
21 there is no clawback provision, your Honor. He's still
22 entitled to that money. There's a carryforward provision but
23 no clawback provision.

24 Unless your Honor has any other questions, I'll sit
25 down.

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1 THE COURT: All right. Did I understand you to argue
2 that there was nothing in Judge Katz's award that was premised
3 upon the indictment in the Eastern District of New York or the
4 facts underlying that indictment?

5 MR. COHEN: There was nothing in his award premised --
6 defendants are arguing that Judge Katz -- the determinations
7 that Judge Katz made, that he did so prior to any evidence
8 coming out about misvaluation of PPVA.

9 THE COURT: Well I understood you to be arguing
10 something different. Take a look at Judge Katz's decision. He
11 didn't think any of those facts were important. That's what I
12 understood you to be arguing to me.

13 MR. COHEN: No, no, your Honor. I apologize. That's
14 not what I'm saying to you.

15 THE COURT: Judge Katz's decision was six months
16 before the indictment.

17 MR. COHEN: Your Honor, if that was the impression I
18 left you, I apologize. I did not mean that in any way shape,
19 or form. Those facts were not available to Judge Katz.

20 What I did say is that defendants have not cited one
21 asset, one loss, anything of substance to show that Judge Katz,
22 had he had that information, would have come to a different
23 conclusion. And that is in part because, your Honor,
24 Mr. Small's bonus calculation is based on realized only gains.
25 So the inflation of assets, the inflation of the value of

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1 assets, if that, in fact, did occur, has nothing whatsoever to
2 do with the amount of money Mr. Small is entitled to for the
3 vast majority of his assets under the IMA and, consequently,
4 for his payout under the operating agreement.

5 THE COURT: Thank you.

6 This is the Court's statement of reasons for its
7 decision on the motion for a preliminary injunction.

8 This action was filed on June 5, 2018 and the Court
9 received a letter from plaintiff's counsel on or about June 7
10 expressing a desire to file preliminary injunction motion. The
11 Court noted that the plaintiff was free to file his motion and
12 for expedited discovery at his convenience, in which the Court
13 would set a briefing schedule after reviewing the submissions.
14 I also in that order required that the plaintiff demonstrate
15 why DMRJ LLC is not a necessary party to the action.
16 Thereafter, the motion for a preliminary injunction was filed
17 on June 15 and the Court set today as the date for the hearing
18 on the motion.

19 At the outset, the Court inquired whether either side
20 wished to produce any other evidence or offer any other
21 evidence of any kind, and each side independently rested on
22 their preliminary injunction written submissions.

23 The motion for a preliminary injunction is to maintain
24 a cash reserve of \$6 million to satisfy a judgment, if any, in
25 favor of the plaintiff in this action.

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1 At argument today the plaintiff made it clear that the
2 premise of the preliminary injunction motion is that he has in
3 his view a good viable claim under the DMRJ agreement for
4 breach of contract in failing to pay certain operating profits
5 or net profits that he says was owed to him.

6 Mr. Small is a minority member of DMRJ group and
7 brings this diversity action for breach of contract, tortious
8 interference with contract. There is a claim styled as an
9 accounting which is actually a claim under Section 10.1C of the
10 DMRJ agreement. There is also a request for the production of
11 the books and records of DMRJ. And it's brought against
12 defendants Christopher Kennedy and Martin Trott, DMRJ's
13 operating managers. As I understand it, they are contractually
14 appointed operating managers of DMRJ. Small is a former
15 portfolio manager of Platinum Management, the hedge fund
16 manager of Platinum Partners Value Arbitrage fund, that's PPVA,
17 and PPVA in turn is a member of DMRJ. PPVA is currently in
18 liquidation in the Cayman Islands where Kennedy and Trott also
19 serve as PPVA's court-appointed liquidators.

20 It's been brought to the Court's attention that there
21 has been an indictment returned against Mr. Small and others
22 and also a SEC civil complaint has been filed against him and
23 these are pending in the Eastern District of New York and they
24 relate to his role, previous role as Platinum Management
25 executive and as a portfolio manager for certain PPVA

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1 investments.

2 Small alleges that Kennedy and Trott breached their
3 obligations under DMRJ's operating agreement to: One, pay
4 Small the contractually set percentage of DMRJ's yearly net
5 profits; two, to provide Small with access to DMRJ's books and
6 records; three, to provide him with the accounting provided for
7 in the agreement; and four, to initiate the liquidation of DMRJ
8 in light of voluntary petition for liquidation of PPVA.

9 As noted, he seeks preliminary injunction to preserve
10 6 million of DMRJ's cash reserve to prevent Kennedy and Trott
11 from dissipating the assets of DMRJ to the point where DMRJ
12 would be unable to satisfy a judgment for Small. Small relies
13 on certain of Kennedy and Trott's representations as joint
14 liquidators of PPVA to argue that they will continue to loot
15 DMRJ for PPVA's benefit in liquidation proceedings.

16 To justify the issuance of a preliminary injunction a
17 party must show that it will suffer an irreparable harm and
18 either a likelihood of success on the merits or sufficiently
19 serious questions going to the merits to make them a fair
20 ground for litigation and a balance of hardships tipping
21 decidedly in the movant's favor.

22 The plaintiff's claim for preliminary injunction fails
23 on several grounds. First of all, in *Grupo Mexicano v.*
24 *Alliance Bond Fund*, which was decided by the Supreme Court in
25 June of 1999, 527 U.S. 308, it was presented with the following

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1 question: "This case presents the question whether, in an
2 action for money damages, a United States District Court has
3 the power to issue a preliminary injunction preventing the
4 defendant from transferring assets in which no lien or
5 equitable interest is claimed." It answered that question in
6 the negative.

7 In that case, the United States appeared as amicus
8 curiae and argued that the remedy should be available in
9 federal courts. And the Court reviewed the historical origins
10 of powers in equity, the merger of law in equity, the adoption
11 of the Federal Rules of Civil Procedure, and concluded that a
12 preliminary injunction is beyond the equitable authority of the
13 district court.

14 The Court noted that "The requirement that the
15 creditor obtain a prior judgment is a fundamental protection in
16 debtor creditor law rendered all the more important in our
17 federal system by the debtor's right to a jury trial and the
18 legal claim. There are other factors which, likewise, give us
19 pause. The remedies sought here could render Rule 64, which
20 authorizes use of state prejudgment remedies, a virtual
21 irrelevant relevance. Why go through..." this is the Court
22 speaking. "Why go through the trouble of complying with local
23 attachment and garnishment statutes when this all-purpose
24 prejudgment injunction is available? More importantly, by
25 adding, through judicial fiat, a new and powerful weapon to the

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1 creditor's arsenal the new rule could radically alter the
2 balance between debtor's and creditor's rights which has been
3 developed over centuries through many laws, including those
4 relating to bankruptcy, fraudulent conveyance and preferences.

5 "Because such a remedy was historically unavailable
6 from a court of equity we hold that the district court had no
7 authority to issue a preliminary injunction preventing
8 petitioners from disposing of their assets pending adjudication
9 of respondent's contract claim for money damages."

10 Well, here we heard that the claim is premised on
11 Mr. Small's claimed right to entitlement under the agreement.
12 And that's a straight-up breach of contract action. And I
13 further find that he has not shown a probability of success on
14 the merits of his breach of contract action because he has
15 failed to account in his evidence the provisions of the IMA
16 agreement which appear to require an adjustment in the
17 6.5 percent profit allocation based on the results of other
18 portfolios under the management of Mr. Small.

19 I've looked at *Gucci America v. Weixing* which in
20 limited circumstances in the trademark infringement context and
21 Lanham Act cases allowed a prejudgment asset restraint based on
22 the Lanham Act claim and its accounting. That case is
23 distinguishable and falls outside the general rule outlined in
24 *Grupo Mexicano* which is applicable here.

25 I also note that Kennedy and Trott are fiduciaries of

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1 PPVA and DMRJ and, accordingly, their decisions will also be
2 governed by their fiduciary duties. And the representation has
3 been made today that DMRJ is not solvent.

4 I also look at the first amended complaint at
5 paragraph 54 and it looks to me like the claim for relief in
6 this action is \$2.5 million. Now, there may be interest.
7 There may be a claim for attorneys' fees. There may be other
8 adjustments that are appropriate. But the request for an
9 injunction exceeds the face amount of the claim that I find in
10 paragraph 54. Now, there may be reasons for this and this is
11 not the material part of my decision but I make that
12 observation.

13 It appears to this Court also that DMRJ, a Delaware
14 LLC, is a separate legal entity with rights and obligations
15 distinct from those of an individual member. And the Court
16 finds no basis to conclude that DMRJ's interests are identical
17 in all respects to Kennedy and Trott's interests.

18 There remains the question of what happens if the
19 plaintiff loses in this action, does Mr. Small have a right to
20 bring a separate action against DMRJ and get a do-over? While
21 there's been some discussion of maybe collateral estoppel might
22 have some application in this circumstance, there was
23 substantially less than a full-throated abandonment of any
24 claim now and forever against DMRJ that tracks the complaint in
25 this action.

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1 I realize that joinder of DMRJ may not be feasible.
2 While it may be subject to service of process, it looks like it
3 would destroy the subject-matter jurisdiction of this Court
4 because Mr. Small is and remains a member of DMRJ and Mr. Small
5 is a New York domiciliary.

6 It appears likely that DMRJ will turnout to be an
7 indispensable party under Rule 19, but that requires a list of
8 factors, four factors enumerated in Rule 19(b) which I don't
9 need to decide today.

10 In terms of irreparable harm, this is a suit
11 principally for money damages and the money damages are an
12 adequate remedy and have not been shown to be anything other
13 than an adequate remedy. Whether Mr. Small is entitled to a
14 books and records inspection or whether he's entitled to
15 conduct an audit of DMRJ does not support in and of itself a
16 injunction requiring the maintenance of a cash reserve, not on
17 this record.

18 Accordingly, the request for a preliminary injunction
19 is denied.

20 Let me ask my deputy for a case management order and
21 I'll set a schedule on this case.

22 How long does the plaintiff need for fact discovery in
23 this case?

24 Has the Court set a conference date, initial
25 conference date in this case?

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1 MR. COHEN: I do not believe so, your Honor.

2 THE COURT: OK. Go ahead.

3 MR. COHEN: Your Honor, I believe a time period of two
4 to three months to complete discovery would be perfectly
5 reasonable.

6 THE COURT: The defendants time to answer or move runs
7 when, August 27?

8 MR. COHEN: The defendant waived service so their
9 answer is due in September.

10 MR. GLUCK: September 18.

11 THE COURT: That's not by extension, that's by
12 operation of the rules; is that correct?

13 MR. COHEN: Yes, your Honor. Under FRCP 4, I believe.

14 THE COURT: What I'm going to do is I'm going to set
15 this down for a conference at 2 p.m. on October 2 and set a
16 schedule for further proceedings in this action.

17 One of the issues that I'm going to want the parties
18 to address is I gather there is little dispute that the parties
19 have or had a right to arbitrate this dispute and are waiving
20 that right under the IMA, but the IMA has another provision,
21 that subject to section 13(b) below the parties waive their
22 right to seek remedies in court, including any right to a jury
23 trial. And the parties should, at least two weeks before the
24 conference, address that issue and I expect a response from the
25 defendants -- I'm going to order a response from the defendants

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1 two weeks from today on the issue of Rule 19.

2 What is your position? Is DMRJ an indispensable
3 party? Is joinder feasible? Is joinder otherwise necessary
4 even if it destroys diversity jurisdiction?

5 I'm sorry. I meant October 5. I said October 2. I
6 meant October 5 at 2 p.m. That was my error. Thank you, madam
7 deputy.

8 All right. Anything further from the plaintiff?

9 MR. COHEN: No, your Honor.

10 THE COURT: Anything further from the defendant?

11 MR. GLUCK: Very small housekeeping, your Honor,
12 concerning the caption. I did get an opportunity to speak
13 again. The caption of this case concerns Mr. Kennedy and
14 Mr. Trott. It was noted in our paper, and it will be in our
15 answer, Mr. Kennedy has switched liquidation firms. He's no
16 longer a liquidator at PPVA or a manager of DMRJ. He has been
17 replaced, I believe last week, by Cayman court order with a
18 gentleman by the name of Chris Smith, a new Chris.

19 Chris Smith nor Chris Kennedy are presently the
20 managers of DMRJ. Well before this action was filed, a
21 resolution or more than one resolution was passed whereby PPVA
22 is the manager of DMRJ and further resolved to continue DMRJ
23 notwithstanding its articles amendment and for that reason we
24 are going to hopefully work with defendants to --

25 THE COURT: Plaintiffs.

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1 MR. GLUCK: Clear up the caption.

2 THE COURT: Plaintiffs.

3 MR. GLUCK: Excuse me. Work with the plaintiffs to
4 clear up the caption.

5 THE COURT: Let me ask you a question. Where do I
6 find this in your papers?

7 MR. GLUCK: There is a footnote regarding the
8 resignation of Mr. Kennedy.

9 THE COURT: Where? Just show me where it is.

10 MR. GLUCK: It's footnote one.

11 THE COURT: In what?

12 MR. GLUCK: In our brief, document 29 on the docket.

13 As well as in the Trott declaration, also footnote 1.

14 THE COURT: Well, I'm looking at footnote 1. And on
15 my copy it reads as follows: "I note that Mr. Kennedy recently
16 resigned from RHSW and as a result will be replaced as a
17 liquidator of PPVA in the near future. I will inform the Court
18 when the Cayman Court enters an order appointing a replacement
19 liquidator."

20 Is that the footnote you're referring to?

21 MR. GLUCK: It is. It's one of the two.

22 THE COURT: Is the other footnote the same?

23 MR. GLUCK: Same exact language as the footnote in the
24 Trott declaration.

25 THE COURT: Where would that put this Court on notice

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1 that it had wasted its time because neither Mr. Kennedy, nor
2 Mr. Trott, could be ordered to maintain an asset freeze because
3 neither of them are operating managers of DMRJ? Where do I
4 find that in your papers?

5 MR. GLUCK: In our papers it's not in there. It's
6 when we were looking at the resolutions recently, in fact, in
7 preparation --

8 THE COURT: No. I'm talking about this afternoon. In
9 this hearing at 2 o'clock today you reserved to yourself the
10 right that if I had given a contrary ruling, Mr. Glock, you
11 could whip out of your back pocket the resolution that the two
12 defendants in the action before me are not parties -- are not
13 capable of complying with the injunction because they are not
14 operating managers of DMRJ? Is that not correct?

15 MR. GLUCK: That is not correct in the slightest bit.
16 This issue of --

17 THE COURT: Is it correct that they are not operating
18 managers of DMRJ?

19 MR. GLUCK: It is correct that they are not operating
20 managers.

21 THE COURT: And is it correct that in the 2 hours and
22 40 minutes of argument on the preliminary injunction motion and
23 in the submissions that you made in response to the preliminary
24 injunction motion you, Mr. Glock, never mentioned that fact.

25 MR. GLUCK: It is true and I intended to mention it

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1 during the course of my argument. I had expected an
2 opportunity just --

3 THE COURT: I didn't give you an opportunity? You
4 didn't have enough time? Is that what you want to sell to me?

5 MR. GLUCK: No.

6 THE COURT: In this 2-hour-and-40-minute hearing?

7 MR. GLUCK: No. I had expected the opportunity to
8 speak. There's a reason I stood up now and I wanted --

9 THE COURT: After I ruled. After I ruled you spoke,
10 sir.

11 MR. GLUCK: I did not know -- I was expecting an
12 opportunity after plaintiff's counsel finished his arguments to
13 deal with the housekeeping matters.

14 THE COURT: It's not a housekeeping matter, sir. An
15 injunction from this Court -- am I correct, an injunction from
16 this Court enjoining Mr. Kennedy and Mr. Trott from requiring
17 them to maintain a reserve would be absolutely unenforceable
18 and not worth the paper it's written on, correct?

19 MR. GLUCK: No. I don't think so. I think it would
20 have been followed. Absolutely. In any event, at the outset I
21 suggested to the Court that there were issues with the caption
22 that I wanted to address.

23 THE COURT: You said at the outset of what?

24 MR. GLUCK: At the outset of my argument I said that
25 they were certain issues.

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1 THE COURT: This is not an issue as to a caption,
2 Mr. Gluck. Do you want me to think that of you?

3 MR. GLUCK: No, I don't at all.

4 THE COURT: Do you want me to think that you think
5 this is an issue of a caption?

6 MR. GLUCK: Firstly, this is something --

7 THE COURT: It's a substantive issue.

8 MR. GLUCK: It is important. But I had discussed this
9 with plaintiff's counsel before this Court, before this
10 hearing.

11 THE COURT: Well let's get to the bottom of that.
12 Mr. Cohen, were you aware that Mr. Trott and Mr. Kennedy were
13 no longer operating managers of DMRJ?

14 MR. COHEN: I was aware based on defendants' footnote
15 that Mr. Kennedy had left, but no. In fact, our court
16 filings -- our filings, your Honor, refer to numerous court
17 papers where they refer to Trott and Kennedy as the operating
18 managers of DMRJ, and that's why we included them as
19 plaintiffs.

20 MR. GLUCK: That's true.

21 THE COURT: Mr. Gluck, I understand what happened here
22 today. I was here for the two hours and 41 minutes.

23 MR. GLUCK: The current -- excuse me. I am very
24 sorry. But on the first paragraph of the Trott declaration it
25 says the current operating member of DMRJ is PPVA. The very

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1 first paragraph.

2 THE COURT: Well I think I asked you not more than
3 five minutes ago, Mr. Gluck, did you mention it in your papers,
4 and you told me you didn't.

5 MR. GLUCK: I pointed to a footnote that I believed
6 encapsulated the sentiment, and I have now been alerted to the
7 fact that in the very first paragraph of the Trott declaration
8 it says, "The current operating member of DMRJ is PPVA."

9 THE COURT: So I should not have read your answer when
10 I asked you: Did you mention this in your papers? Did you
11 mention it during your argument? And you said there is this
12 footnote, I should have analyzed that and say: Well, that
13 isn't really responsive to my question, he didn't answer it, so
14 maybe he said it some place else; he pointed to the footnote
15 but he never said I didn't say it in my papers. Is that the
16 way I should listen to your arguments going forward, Mr. Gluck?

17 MR. GLUCK: Absolutely not. I think you should listen
18 to my arguments the way that I'm intending to convey them which
19 is that you asked a specific question about where in a set of
20 papers consisting of a series of declarations and briefs this
21 could be found. I happened to remember, as I'm standing up
22 here, that there had been a footnote. I knew there had been a
23 footnote. And so that footnote, I asked my colleagues to find
24 and read that footnote. What I didn't remember standing here
25 today, not having each paragraph memorized, is that in addition

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1 to that footnote, in the very first paragraph of the Trott
2 declaration it says, "The current operating member of DMRJ is
3 PPVA." And this precise issue is one that I wanted to raise to
4 the Court at -- I understand the Court's --

5 THE COURT: That's why you wrote me a letter about it
6 before the argument. That's why you said you can't proceed
7 with the preliminary injunction motion, Judge, because it seeks
8 relief against two people who are no longer operating managers.

9 MR. GLUCK: Again, without a perfect memory, I believe
10 our letter was requesting discovery as against the plaintiff.

11 THE COURT: My tongue is firmly in cheek because,
12 Mr. Gluck, you never raised it in a letter.

13 MR. GLUCK: This issue.

14 THE COURT: The fact that the Court is entertaining a
15 preliminary injunction motion against two individuals who, if
16 the Court granted the injunction, would not be capable of
17 complying with it. Thank you all very much.

18 (Adjourned)

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